In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1175

DOROTHY HINCHCLIFF, PETITIONER

v.

JAMES M. CLARKE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

This case originated in an application by the government for enforcement of an Internal Revenue Service summons, issued in connection with an investigation of the civil tax liabilities of Alfred W. Hinchcliff (now deceased) and his wife, Dorothy, for the years 1945 through 1960. The district court denied the application and ordered the return and suppression of certain evidence already obtained by the government (Pet. 9a–49a). The court of appeals reversed and remanded with instructions to order compliance with the summons, except as to such documents as the district court might find to be "books of account" of the Hinchcliffs (Pet. 54a–62a). The issues raised in the petition either are not presented by the instant

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record or are not yet ripe for consideration by this Court.

In early 1961 Internal Revenue Agent Clarke was assigned to investigate the Hinchcliffs' returns for 1957, 1958 and 1959, as to which years the normal three year statute of limitations on assessment and collection had not yet expired. Finding discrepancies in these returns, the agent broadened his investigation to include earlier years. (R. 149a–150a, 251a–252a, 318a.) [1] On May 3 the agent asked Mr. Graf, a certified public accountant who had performed accounting services for the Hinchcliffs, for his worksheets and his retained copies of the returns for years prior to 1957.[2] He cautioned Graf that he wanted only records which belonged to him, and that since no "reopening letter" had been sent to Mrs. Hinchcliff with regard to the years 1945–1956, which years had already been examined once, he did not want anything belonging to her.[3] Graf gave the agent approximately 15 documents, which the agent photostated and returned to Graf. (R. 294a–298a, 305a–307a, 317a–321a, 329a, 340a.)

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[1] "R." references are to the appendices of the parties in the court below.

[2] An Ohio statute provides that the work papers of a C.P.A. are his property in the absence of an express agreement to the contrary. 47 Page's Ohio Rev. Code Ann. (1966 Supp.) § 4701.19.

[3] 1954 Code § 7605(b) provides that "only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary or his delegate, after investigation, notifies the taxpayer in writing that an additional inspection is necessary." See generally *United States* v. *Powell*, 379 U.S. 48.

Approximately a week later, Mrs. Hinchcliff and her attorney, Mr. Clyne, demanded that Graf turn over everything he had pertaining to the Hinchcliffs, and Clyne threatened Graf with legal action[4] (R. 133a, 168a–169a). Thereafter the agent served Graf with the summons for the production of his papers which gave rise to the present proceeding[5] (R. 18a, 126a). Since both the agent and Graf recognized that there might be a dispute as to the ownership of some of the documents, they placed in sealed containers those papers which Graf believed to be his, and Graf returned to Mrs. Hinchcliff other books and records which belonged to her (R. 123a–143a, 150a–152a, 182a–183a, 222a, 297a–298a, 302a–303a, 319a–321a, 323a–324a, 329a).

On May 24 Agent Clarke instituted the present proceeding by filing with the United States Commissioner an application for an order directing Graf to comply with the summons by production of the sealed documents. Mrs. Hinchcliff was allowed to intervene and she also filed a complaint for an injunction against the agent in the district court. The two proceedings

[4] Agent Clarke had originally been referred to Graf by Clyne. There was some conflict in the testimony as to Graf's instructions: Graf testified that both Clyne and Mrs. Hinchcliff told him to give the agent anything he wanted; Clyne, on the other hand testified that his conversation with Graf had not involved years previous to 1957, as to which the statute of limitations had run in the absence of fraud. See 1954 Code § 6501(c). (R. 148a–150a, 152a–154a, 169a–173a, 180a, 251a, 253a.)

[5] Although the summons was broadly worded, the government has always taken the position that it required Graf to produce only those documents which belonged to him, including his copies of documents he had used (R. 147a–148a, 198a, 259a–260a, 311a).

were consolidated for hearing and disposition by the district court. (R 3a, 15a–22a, 30a–36a, 49a–52a, 113a–114a.)

The district court, relying upon the testimony of Graf and Agent Clarke as to their conversations, and without resolving conflicts with Clyne's testimony (R. 73a–74a), concluded that the agent had violated the provisions of § 7605 (a) and (b) of the Internal Revenue Code [6] by examining the Hinchcliffs' records for the years 1945–1956 without sending a "reopening letter" and by serving upon Graf a summons which called for immediate compliance (R. 74a–75a). The court found that some of the papers in the sealed boxes belonged to the Hinchcliffs, while others belonged to Graf (R. 84a), but the court concluded that the only effective remedy was to bar the government from using any of the papers or from ever reacquiring them (R. 75a–79a, 102a–110a, 117a–118a).

The court of appeals reversed. It held that Agent Clarke, in his dealings with Graf and in his issuance of the summons, had not violated § 7605(b), because that section requires the issuance of a "reopening letter" only when the Internal Revenue Service desires to reexamine a "taxpayer's books of account" which are in his possession (Pet. 58a–60a). The court also held that "few if any of [the documents given by Graf to Agent Clarke] represent what may reasonably

[6] Section 7605(a) provides that "In the case of a summons under authority of paragraph (2) of section 7602 * * * the date fixed for appearance before the Secretary or his delegate shall not be less than 10 days from the date of the summons." Section 7605(b) is quoted *supra*, fn. 3.

be construed as 'books of account' of the taxpayer" (Pet. 60a). However, since there was a possibility that some of the Hinchcliffs' "books of account" might be involved, and since Mrs. Hinchcliff might have recovered possession of those if the summons to Graf had complied with the 10-day notice provision of § 7605(a) (see *Reisman* v. *Caplin*, 375 U.S. 440, 446, 449–450), the case was remanded to the district court to determine whether any of the Hinchcliffs' "books of account" are among the impounded documents (Pet. 60a, 62a).

1. Petitioner first urges (Pet. 3–4, 13–21) the Court to grant the present petition in order to determine whether unconstitutionally seized evidence may be used in civil or administrative proceedings.[7] However, this issue is not raised by the record in the instant case. In the first place there was no unreasonable search or seizure; everything obtained by the agent from Graf was turned over voluntarily. Moreover, the court of appeals has upheld enforcement of the subpoena only as to those documents which belonged to Graf, remanding to the district court for a determination as to which documents belong to the Hinchcliffs. As to the documents which belonged to Graf, there is no

[7] Agent Clarke's investigation led him to conclude that, for the period from 1945 through 1959, the Hinchcliffs' returns had understated taxable income by at least $400,000 (R. 200a–213a). The record does not indicate to what extent this estimate depended on the documents obtained from Graf (R. 330a, 335a). No criminal prosecution is possible since the six year statute of limitations has run (1954 Code § 6531) and Mr. Hinchcliff is dead.

longer any dispute that these were legally obtained by the government.[8]

2. Petitioner also argues that enforcement of the summons as to any documents which belonged to the Hinchcliffs would violate § 7605 (a) and (b) because of the failure to give Graf 10-days' notice and the lack of a "reopening letter" to Mrs. Hinchcliff (Pet. 3–4, 21–22). This issue, however, is not ripe for consideration by this Court. The opinion of the court of appeals stated that "few if any of [the documents] represent what may reasonably be construed as 'books of account' of the taxpayer" (Pet. 60a) and remanded to the district court for a determination of that question. On the present state of the record there is, therefore, no final finding as to the ownership of the records in the sealed boxes nor as to which are "books of account" within the meaning of § 7605(b). Until these determinations are made, there is no assurance that petitioner will be aggrieved by the court of appeals' decision. Review by this Court is thus not appropriate at this time.

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[8] The district court suppressed the records which belonged to Graf (R. 76a–79a) because, in its view, they were inextricably bound up with an illegal seizure of records belonging to the Hinchcliffs. The implicit rejection of this ruling by the court of appeals (Pet. 58a–60a) was clearly correct (see *Wong Sun* v. *United States*, 371 U.S. 471, 488; *United States* v. *Poller*, 43 F. 2d 911 (C.A. 2)), and the petition does not argue the point.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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